No. 21850

United States Court of Appeals

For the Ninth Circuit

ALFRED ROMERO AND GLORIA J. ROMERO,
Appellants,

vs.

TEN EYCK-SHAW, INC., XYZ Corporations K through X and JOHN DOE I through X
Appellees.

Opening Brief of Appellants, Alfred Romero and Gloria J. Romero, Husband and Wife

MESCH, MARQUEZ & ROTHSCHILD
239 North Church Avenue
Tucson, Arizona

HIRSCH, VAN SLYKE & OLLASON
182 North Court Avenue
Tucson, Arizona

Attorneys for Appellants

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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JURISDICTIONAL BASIS

Appellants are residents and citizens of the State of Arizona and Appellee is a citizen of the State of Texas and does not have its principal place of business in the State of Arizona and was doing business in the State of Nevada at the time the event complained of occurred. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. Jurisdiction of the District Court of the United States for the State of Nevada in this matter is based upon the above facts alleged in plaintiff's complaint, Title 28, U.S.C. 1332.

The appeal is taken from the granting of a summary judgment of the District Court of the United States for the District of Nevada entered March 20, 1967. This Court has jurisdiction of appeals from all final decisions of District Courts of the United States, except where there is a direct appeal to the United States Supreme Court, Title 28, U.S.C. 1291 states that there is no direct review to United States Supreme Court available to appellant. Notice of Appeal from such judgment of the United States Court of Appeals for the Ninth Circuit was timely filed upon an appeal.

STATEMENT OF THE CASE

The complaint alleges that appellant, Alfred Romero, was employed in Arizona by Guy Apple Masonry Contractor, Inc., a citizen of Arizona, to work on a project in the State of Nevada, and that while so employed appellant was injured by reason of the negligence of Ten Eyck-Shaw, Inc. in that one of appellee's employees so negligently maintained, operated and controlled a certain elevator and equipment that the elevator in which appellant was riding fell violently to the ground with appellant sustaining injuries. To this complaint the appellees filed a Motion to Dismiss. A Response to the Motion to Dismiss was filed and a hearing held on November 21, 1966, the Motion to Dismiss was denied without prejudice to file a Motion For Summary Judgment. An Answer to the Complaint was filed on January 11, 1967 a Motion for Summary Judgment was filed by appellees. Response to the Motion for Summary Judgment was filed and summary judgment was granted in favor of the appellee and against the appellant on March 20, 1967 with Findings of Fact and Conclusions of Law being filed simultaneously.

QUESTIONS PRESENTED

When an employer, covered by the Arizona Workman's Compensation Act, hires an employee in the State of Arizona to do work in the State of Nevada, is the employee entitled to all benefits of the Arizona Statutes pertaining to the Workman's Compensation Act, even though such benefit would be prohibited under the State of Nevada's Workman's Compensation Act?

ARGUMENT ON THE QUESTION

The question before the Court is quite clear.

May an employee hired in Arizona to work in Nevada reap the benefits of the Arizona statute relating to the Workmen's Compensation Act?

There are numerous cases that touch on the question. The Appellants will attempt to set these forth in detail in an attempt to shed as much light as possible on the problem before the Court.

In *Bradford Electric Light Co. v. Clapper* (1932), 286 U.S. 145, 52 S. Ct. 571, a Vermont employer made a contract in Vermont with an employee, also a resident of Vermont, by which they accepted the Vermont Workmen's Compensation Act, which provided that injury or death of an employee suffered in Vermont or elsewhere during the course of his employment would be compensated for only as provided for by the Act, without recourse to actions based on tort. The employee died of an injury he received while casually working in New Hampshire. His administratrix brought an action in New Hampshire under the Workmen's Compensation Act of the state for damages by reason of his death, which was claimed to have been caused by employer's negligence. Judgment for plaintiff was reversed by the Supreme Court of the United States. The Court ruled the Vermont Statute was a defense to the employer against the

death action brought in New Hampshire, and that refusal to recognize such defense was a failure to give full faith and credit to the Vermont statute.

The scope of this ruling was materially restricted by the Court's subsequent decisions in *Alaska Packer's Association v. Industrial Accident Commission* (1935), 294 U.S. 532, 55 S. Ct. 518, and *Pacific Employers Insurance Co. v. Industrial Accident Commission* (1939), 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940. In these cases the Supreme Court stated that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce the law of another state, in contravention of its own statutes or policy. Where the policy of one state's statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests is apparent, and the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight. The Court stated that full faith and credit does not enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequence of the acts within it.

In *Pacific Employers Insurance Co.* (supra) an employee of a Massachusetts corporation, resided in Massachusetts and regularly employed in that state under a contract of employment entered into there, was injured in the course of his employment while temporarily in California. The Massachusetts Workmen's Compensation statute purported to give an exclusive remedy, even though the injury was incurred outside the state. The Supreme Court of California

in *Pacific Employers Insurance Co. v. Industrial Accident Commission* (1938), 10 Cal. 2d 567, 75 P.2d 1058, affirmed a lower court ruling which refused to set aside an award of compensation to the employee by the California Industrial Accident Commission. The Supreme Court of California affirmed, holding that the Courts of California were not bound by the full faith and credit clause to apply, contrary to the policy of the state, the Massachusetts statutes or to recognize it as a defense to the claim of the employee under the Workmen's Compensation Statute of California. It pointed out that the California Act was in conflict with the Massachusetts Act, and stated at 75 P.2d 1073:

> "It would be obnoxious to that policy (California's) to deny persons who have been injured in this state the right to apply for compensation when to do so might require physicians and hospitals to go to another state to collect charges for medical care and treatment given to such persons."

The opinion from the Supreme Court of the United States in the Pacific Employers case summarized the ruling of the Clapper case as follows: *Pacific Employers Insurance Co. v. Industrial Accident Comm.* (1939), 306 U.S. 483, 504, 59 S. Ct. 629, 634:

> "The Clapper case can not be said to have decided more than that a state statute applicable to employer and employee within the state, which by its terms provides compensation for the employee if he is injured in the course of his employment, while temporarily in another state, will be given full faith and credit in the latter when not obnoxious to its policy."

It distinguished the Clapper case by pointing out that there was nothing in the New Hampshire statute, the decisions of its courts, or in the circumstances of the case, to

suggest that reliance on the provisions of the Vermont statute, as a defense to the New Hampshire suit, was obnoxious to the policy of New Hampshire.

While the Clapper decision has been diluted by later cases dealing with Workmen's compensation, there is nothing in the later cases to give support to the proposition that full faith and credit must give way to a local policy not embodied in a statute which directly governs the cause of action. Thus full faith and credit would lean to application of Arizona law.

In *Hughes v. Fetter* (1951), 341 U.S. 609, 71 S. Ct. 980, plaintiff brought an action in Wisconsin based on Illinois's wrongful death statute. Accident had occurred in Illinois; defendant was apparently a resident of Wisconsin. State Court held that the Wisconsin statute, which created a right of action only for deaths caused in that state established a local public policy against Wisconsin's entertaining suit brought under the wrongful death acts of other states. Held: Construing local statute thus violates full faith and credit clause, Article IV, Section 1. (Quoting from the case, 341 U.S. 611, 71 S. Ct. 982):

> "We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather, it is for this Court to choose in each case between the competing public policies involved. The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states. The more basic conflict involved in the present appeal however, is as follows: On the one hand is the strong unifying principle embodied in the full faith and credit clause looking toward maximum enforcement in each state of the obligations created or recognized by the statutes of sister states; on the other hand is the policy of Wisconsin as interpreted by its highest court,

against permitting Wisconsin courts to entertain this wrongful death action."

"We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general."

In *Carroll v. Lanza* (1955), 349 U.S. 408, 75 S. Ct. 804, the Supreme Court of the United States held that the Federal Constitution, Article IV, Section 1, does not require the state of the forum to recognize the exclusive remedy provisions of the Workmen's Compensation statute of another state, and that the state of the forum may permit a tort recovery by an injured employee even though a tort action by him would be prohibited by the Workmen's Compensation statute of the state where he was employed. The effect of this decision which reversed the contrary holding of the Court of Appeals for this circuit was to reinstate the original decision of the court. In the original opinion in *Carroll v. Lanza* (1953), 116 F. Supp. 491 at 502, the following was stated:

"The rule now seems to be that any state having a substantial connection with the employee-employer relationship may apply its own Workmen's Compensation Act. Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 476, 67 S. Ct. 801, 91 L. Ed. 1028. See also Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622, 67 S. Ct. 886, 91 L. Ed. 1140. (Permitting recovery under both the Illinois and the Wisconsin Acts.) And, a state having the right to apply its own Workmen's Compensation Act would also have the right to apply its own third party practice. See. Vol. 2, Larson's Workmen's Compensation Law, Section 88.23, P. 407."

It appears that for all practical purposes Lanza overruled the earlier decision in *Bradford Electric Light Co. v.*

Clapper (1932), 286 U.S. 145, 52 S. Ct. 571, and that under the *Carroll v. Lanza* rule, the place of injury clearly has power to grant a tort recovery under its own law even though the place of contract or other place creating compensation rights would say that no tort right exists.

The facts in *Carroll v. Lanza* (1955), 349 U.S. 408, 75 S. Ct. 804, were as follows:

Carroll was employed by Hogan. Both Carroll and Hogan were residents of Missouri, and the employment contract was made in Missouri. Hogan was a subcontractor for Lanza in Arkansas. While Carroll was working for Hogan on a job for Lanza, Carroll was injured. He was not aware that he had remedies under Arkansas law so he received payment from Missouri. The Missouri compensation act is applicable to injuries received outside the state where the contract of employment is made in Missouri. The Act provides that the remedies granted by it exclude all of the common law rights and remedies. The Arkansas Act says workmen's compensation is the exclusive remedy against employer (here Hogan) but not against a third party (here Lanza). Carroll decided to sue Lanza for damages in Arkansas. Lanza had the suit removed to Federal Court. Judgment for Carroll under Arkansas law. The Court of Appeals felt that the full faith and credit clause barred recovery. Held: Judgment reversed. Carroll was entitled to sue under Arkansas law. Home state remedy was not exclusive.

In *Crider v. Zurich Insurance Co.* (1965), 380 U.S. 39, 85 S. Ct. 769, Crider was a resident of Alabama and was employed there by Lawler, a Georgia corporation. Crider and Lawler were both under Georgia Workmen's Compensation when Crider was injured. Crider sued in Alabama under Georgia law and got default. Crider then

brought an action against Lawler's insurer in Federal District Court. Motion to dismiss granted and affirmed by Court of Appeals. Reversed. Held: Alabama Court could apply the Georgia Workmen's Compensation Act, at 380 U.S. 39, 41; 85 S. Ct. 769, 770:

> "The state where the employee lives has perhaps even a larger concern (than the state where the tort occurs), for it is there that he is expected to return; and it is on his community that the impact of the injury is apt to be most keenly felt. * * *"

The Alabama policy in that regard is reflected in the judgment rendered by the Alabama Court on which the federal suit was instituted. That Alabama judgment adopted and enforced the remedy provided by Georgia, 380 U.S. 42, 85 S. Ct. 770:

> "A procedure we indicated in Pacific Employers Insurance Co. v. Industrial Accident Commission (1939), 306 U.S. 439, 59 S. Ct. 629, a state might follow. Here, as in the Alaska Packer's Association v. Industrial Accident Commission, supra (1935), 294 U.S. 544, 55 S. Ct. 522."

It is felt that *Hughes v. Fetler* (1951), 341 U.S. 609, 71 S. Ct. 980, is of such significance to the present fact situation that the following quote could almost with some minor changes sum up the case before this Court. By inserting Nevada in place of Wisconsin it would hardly be distinguishable from *Romero v. Ten-Eyck Shaw.*

> "The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states. The more basic conflict involved in the present appeal, however, is as follows: On the one hand is the strong unifying principle embodied in the full faith and credit clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the

statutes of sister states; on the other hand is the policy of Wisconsin, as interpreted by its highest court, against permitting Wisconsin courts to entertain this wrongful death action.

"We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature, the exclusionary rule extending only so far as to bar actions for death not caused locally. The Wisconsin policy, moreover, cannot be considered as an application of the *forum non convenience* doctrine, whatever effect that doctrine might be given if its use resulted in denying enforcement of public acts of other states. Even if we assume that Wisconsin could refuse, by reason of particular circumstances, we fear foregoing controversies to which nonresidents were parties, the present case is not one lacking a close relationship with the state. For not only were appellant, the decedent and the individual defendant all residents of Wisconsin, but also appellant was appointed administrator and the corporate defendant was created under Wisconsin laws. We also think it relevant, although not crucial here, that Wisconsin may well be the only jurisdiction in which service could be had as an original matter on the insurance company defendant. And while in the present case jurisdiction over the individual defendant apparently could be had in Illinois by substituted service, in other cases Wisconsin's exclusionary statute might amount to a deprivation of all opportunity to enforce valid death claims created by another state.

"Under these circumstances, we conclude that Wisconsin's statutory policy which excludes this Illinois cause of action is forbidden by the national policy of the full faith and credit clause."

The *Clapper* case has in effect been overruled. What has been decided in the *Alaska, Pacific* and *Carroll* cases is not

that a forum state can ignore the Workmen's Compensation law of a sister state in every circumstance. What these cases hold—and to this extent overrule Clapper—is that when the sister state's Workmen's Compensation law is more restrictive in providing an injured employee redress, the forum state is free to follow its own law. But in our case it is the forum state (and not the sister state) whose law is more restrictive. Therefore, the results in those cases should be construed in favor of appellant.

There is no restriction concerning more than one statute applying to a single compensable injury so long as each state has a relevant interest in the case. Actually, the present fact situation is merely a successive award. *Industrial Commission of Wisconsin v. McCartin* (1947), 330 U.S. 662, 67 S. Ct. 886. The *McCartin* case, one of the landmark cases, was a fact situation wherein an Illinois resident had made a contract of employment with an Illinois employer in Illinois, pursuant to which he did some work in Wisconsin, in the course of which he was injured. He began compensation proceedings in both states. While the Wisconsin proceedings were pending, the Illinois commission issued a formal order approving a settlement agreement under Illinois law, and full payment was made under the order.

The Supreme Court of the United States, by unanimous vote, reinstated the Wisconsin award. Since the vast majority of compensation laws resemble the Illinois law in this respect, the decision has been taken to mean that for all practical purposes successive awards are sanctioned.

The crucial paragraph of the McCartin opinion, setting forth the reason for its conclusion is sufficiently important to warrant quotation in full. The Court first quotes the Illinois exclusive-coverage clause and shows that it means in Illinois (as it does in practically every other state) that

it is exclusive only in the sense that no other common law or statutory remedy *under local law* can be sought. The Court then goes on to say: 330 U.S. 627, 67 S. Ct. 889,

> "But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment. (Citing cases.) And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted, (citing cases.) And in light of the rule that workmen's compenso as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play. (Citing cases.)
>
> "We need not rest our decision, however, solely upon the absence of any provision or construction of the Illinois Workmen's Compensation Act forbidding an employee from seeking alternative or additional relief under the laws of another state. . . ."

The reasoning set forth by the District Court in its decision to the effect that the Arizona employer could have requested an exemption under the Nevada Compensation Act should have no more weight than the fact than an express agreement between employer and employee that the statute of a named state shall apply is ineffective either to enlarge the applicability of that state's statute or to diminish the applicability of the statutes of other states. Whatever the rule may be as to questions involving commercial paper, interest, usury and the like, the rule in workmen's compensation is dictated by the overriding consideration that com-

pensation is not a private matter to be arranged between two parties; the public has a profound interest in the matter which cannot be altered by any individual agreements. This is most obvious when such an agreement purports to destroy jurisdiction where it otherwise exists; *Alaska Packers Association v. Industrial Accident Commission* (1935), 294 U.S. 532, 55 S. Ct. 518; practically every statute has emphatic prohibitions against cutting down rights or benefits by contract. The only exception occurs under several statutes which explicitly permit the parties to agree that the local statute shall not apply to out-of-state injuries. Alabama, Kansas, Kentucky, Missouri, and Tennessee.

And this is no less true in the instant fact situation since the employee for all practical purposes is not made aware of whether or not his employer is or is not filing or requesting an exemption under the Nevada statute.

It is submitted that the present appeal should in essence be controlled by the reasoning in *Miller v. Yellow Cab Co.* (1941), 308 Ill. App. 217, 31 N.E.2d 406. In the *Miller* case the plaintiff was a Texas employee of a Texas employer and had been injured during a temporary business errand in Illinois. Texas permits suits against any third party, while Illinois has the most restrictive kind of third-party staute, prohibiting suit by the employee against any third person who himself is under the Illinois compensation act. Illinois allowed the suit, on the ground that third-party rights are fixed by the law of the state granting compensation. The court also apparently assumed that Illinois would not have awarded compensation if an award had been sought under the Illinois Act; and therefore, Illinois Compensation provisions did not come into play at all.

It is submitted that the whole idea and philosophy of compensation legislation is to prevent the throwing of an injured workman on local charity, and therefore, the State of Arizona has a highly relevant interest in forestalling that

event; thus the State of Nevada must give full faith and credit to the cause of action against the negligent third party. Certainly if the situation were reversed the State of Arizona would give full faith and credit to the Nevada statutes, for A. R. S. 23-904 is quite clear.

> "A. If a workman who has been hired or is regularly employed in this state receives a personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though the injury was received without the state.
>
> "B. If a workman who has been hired without this state is injured while engaged in his employer's business, and is entitled to compensation for the injury under the law of the state where he was hired, he may enforce against his employer his rights in this state if they are such that they can reasonably be determined and dealt with by the commission and the courts in this state." A. R. S. 23-904.

Wherefore, it is submitted that the decision of the Federal District Court for the State of Nevada be overruled and the case sent back for appropriate proceedings.

Mesch, Marquez & Rothschild
239 North Church Avenue
Tucson, Arizona

Hirsch, Van Slyke & Ollason
182 North Court Avenue
Tucson, Arizona
Attorneys for Appellants

By: Lawrence Ollason

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Lawrence Ollason